

UNITED STATES TAX COURT
WASHINGTON, DC 20217

MICHAEL ANTHONY & ELIZABETH ANN)	
SKARBINSKI,)	
)	
Petitioners,)	
)	
v.)	Docket No. 18189-11.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	
)	
)	
)	

ORDER

Pursuant to Rule 152(b), Tax Court Rules of Practice and Procedure, it is

ORDERED that the Clerk of the Court shall transmit herewith to petitioners and to respondent a copy of the pages of the transcript of the trial in the above case before Judge David Gustafson at Boston, Massachusetts, on April 11, 2012, containing his oral findings of fact and opinion rendered at the conclusion of the trial.

In accordance with the oral findings of fact and opinion, decision will be entered under Rule 155.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
April 24, 2012

SERVED Apr 24 2012

1 Bench Opinion by Judge David Gustafson April 11, 2012
2 Skarbinski v. Commissioner Docket No. 18189-11

3 THE COURT: The Court has decided to render
4 oral Findings of Fact and Opinion in this case, and
5 the following represents the Court's oral Findings of
6 Fact and Opinion, which shall not be relied on as
7 precedent in any other case.

8 This Bench Opinion is made pursuant to the
9 authority granted by section 7459(b) of the Internal
10 Revenue Code of 1986, as amended, and Rule 152 of the
11 Tax Court Rules of Practice and Procedure.

12 By notice of deficiency dated May 2, 2011,
13 respondent (the IRS) determined a deficiency in the
14 Federal income tax of Petitioners Michael Anthony and
15 Elizabeth Ann Skarbinski in the amount of \$16,792 for
16 the year 2008, plus an addition to tax under section
17 6651(a)(1) in the amount of \$2,434, and an accuracy-
18 related penalty under section 6662(a) in the amount of
19 \$1,947. For the reasons explained hereafter, we will
20 sustain the deficiency in large part, and will sustain
21 the addition to tax and the accuracy-related penalty.
22 We will also impose a penalty under section 6673(a).

23 Trial of this case was conducted on
24 April 10, 2012, in Boston, Massachusetts. Respondent
25 was represented by Erika B. Cormier, and petitioners

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1 represented themselves and were the only witnesses.

2 We find the following facts:

3 Findings of Fact

4 Mr. Skarbinski graduated from high school,
5 served his country as a United States Marine, and took
6 some college courses (but did not get a college
7 degree). He has worked for years at the Maine Medical
8 Center. Mrs. Skarbinski graduated from college with a
9 Bachelor of Science degree in nursing and has been a
10 Registered Nurse since 1985. In 2008, as now, they
11 had five children, and respondent stipulated that in
12 2008 the Skarbinskis were entitled to dependency
13 exemptions for all five.

14 Income and deductions in 2008

15 In the year 2008 the Skarbinskis received
16 compensation for services totaling \$127,696. As we
17 previously held in our order of March 12, 2012, this
18 was taxable income. The parties have stipulated that
19 in 2008 the Skarbinskis incurred and paid \$18,222 in
20 mortgage interest, \$3,565 in real property tax, and
21 \$159 in excise tax on automobiles. (The Skarbinskis
22 have abandoned an earlier contention that they were
23 entitled to deductions for charitable contributions.)

1 The Skarbinski's tax return

2 The Skarbinskis first filed a Federal income
3 tax return for 2008 on September 17, 2009. On their
4 return, the Skarbinskis reported only \$482 of total
5 income and zero tax liability. They also reported
6 their \$7,058 of Federal income tax withholding and
7 \$9,637 of supposed "Excess social security * * * tax
8 withheld" (consisting of apparently all their social
9 security tax) and requested a refund of both. To
10 their return they attached not the Forms W-2, "Wage
11 and Tax Statement", and 1099, "Miscellaneous Income",
12 reflecting their compensation, but instead Forms 4852,
13 "Substitute for Form W-2, Wage and Tax Statement, or
14 Form 1099-R, Distributions From Pensions, Annuities,
15 Retirement or Profit-Sharing Plans, IRAs, Insurance
16 Contracts, etc.", on which the wage amounts were given
17 as zero but the withholding amounts were reported. By
18 way of explanation on those Forms 4852, the
19 Skarbinskis stated, "correction of non-federally
20 connected monies for private sector earnings". On
21 their return they claimed the standard deduction and
22 did not attach a Schedule A reporting itemized
23 deductions (such as mortgage interest, property tax,
24 and automobile tax).

1 The IRS's notice of deficiency

2 On May 2, 2011, the Internal Revenue Service
3 ("IRS") issued the Skarbinskis a notice of deficiency,
4 determining a tax deficiency of \$16,792, an addition
5 to tax of \$2,434 under section 6651(a)(1) for failure
6 to timely file their return, and an accuracy-related
7 penalty of \$1,947 under section 6662(a).

8 Proceedings in this case

9 On July 30, 2011, the Skarbinskis timely
10 mailed their petition to this Court, requesting a
11 redetermination of their liabilities. At that time
12 they resided in Maine.

13 On February 9, 2012, the Commissioner filed
14 his motion for summary judgment and for imposition of
15 a penalty under section 6673(a) for maintaining
16 frivolous positions in this suit. By order of
17 February 10, 2012, the Court directed the Skarbinskis
18 to file a response to the Commissioner's motion and
19 stated:

20 The Commissioner's motion rightly
21 points out that if a Tax Court petitioner
22 maintains a frivolous position in Tax Court
23 litigation, then he may be at risk of a
24 penalty under section 6673(a) of up to as
25 much as \$25,000. The Court is not even

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1 likely to address frivolous arguments in an
2 opinion, but will simply give them the short
3 shrift that they deserve. See Wnuck v.
4 Commissioner, 136 T.C. 498 (2011). Without
5 prejudging the Commissioner's motion, the
6 Court warns the Skarbinskis that it indeed
7 appears that their position is frivolous. A
8 phrase that appears on the purported Forms
9 4582 and the Form 843 that are attached to
10 the Commissioner's motion--"non-federally
11 connected monies for private sector
12 earnings"--appears to be short-hand for a
13 frivolous argument that previous petitioners
14 have attempted to maintain before this
15 Court, and the argument inevitably fails.
16 Whether from the private sector or the
17 public sector, all compensation is taxable.
18 See I.R.C. sec. 61(a)(1). The position that
19 only Federal employees are subject to income
20 tax is frivolous. See Ulloa v.
21 Commissioner, T.C. Memo. 2010-68, slip op.
22 at 10, n.6; Rev. Rul. 2006-18, 2006-1 C.B.
23 743.

24 If the Skarbinskis have been
25 maintaining this frivolous position, then

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1 they should cease doing so. In their
2 response to the motion for summary judgment,
3 they should disclaim any frivolous positions
4 they have maintained and should assert
5 instead only legitimate arguments, such as
6 additional deductions or credits to which
7 they may be entitled but that they were not
8 allowed in the IRS's notice of deficiency.
9 The Court will be pleased to adjudicate any
10 legitimate disputes between the parties.

11 On February 29, 2012, the Skarbinskis filed
12 their response to the IRS's motion for summary
13 judgment. The response does not mention "non-
14 federally connected" or "private sector" earnings but
15 apparently abandons the theory stated on their Forms
16 4582. Instead, their response explains, "The
17 Petitioners have not stated nor opine that wages are
18 not taxable. The Petitioners question the tax
19 liability of earned income." Their opposition argued
20 that the income tax does not reach "earned" income.
21 They acknowledged that section 61(a) reaches "all
22 income from whatever source derived", but they
23 contended that "all income" for purposes of section
24 61(a) "includes unearned or privileged income and does
25 not include compensation for personal services as it

1 relates to earned income."

2 The Court granted the IRS's motion in part,
3 holding the Skarbinskis' earnings to be taxable, but
4 denied the motion without prejudice as to the
5 Skarbinskis' entitlement to deductions and their
6 liability for the addition to tax and accuracy-related
7 penalty. The Court also took under advisement the
8 IRS's motion for a section 6673(a) penalty and
9 scheduled it to be heard at the same time as the trial
10 of this case.

11 The Skarbinskis followed the Court's
12 suggestion and provided to the IRS substantiation for
13 some deductions. Before trial the IRS conceded the
14 Skarbinskis' deduction for mortgage interest and real
15 property interest and their entitlement to dependency
16 exemptions. During trial the IRS conceded their
17 entitlement to a deduction for automobile taxes.
18 Because the income issue was resolved on summary
19 judgment and the deduction issues are no longer
20 disputed, the amount of the deficiency can now be
21 recomputed, and the parties will be ordered to do so
22 under Rule 155.

23 At trial the Skarbinskis did not advance
24 frivolous contentions, and they stated their intention
25 to comply with the tax laws in the future and to

1 report their earnings as taxable income.

2 Opinion

3 I. Addition to tax for failure to timely file

4 Section 6651(a)(1) authorizes the imposition
5 of an addition to tax for failure to file a timely
6 return unless the taxpayer proves that such failure is
7 due to reasonable cause and is not due to willful
8 neglect. The IRS determined this addition to tax for
9 2008. The IRS's records show the filing on
10 September 17, 2009, and no earlier filing. Those
11 records are presumed correct; they satisfy the IRS's
12 burden under section 7491(c); and petitioners then had
13 the burden to prove timely mailing. But the
14 Skarbinskis admit they did not send the return by
15 certified or registered mail (see sec. 7502(c)) and
16 that they did not obtain any other receipt of mailing.
17 In fact, neither petitioner professes to explicitly
18 remember filing the return by April 15, 2009; and Mr.
19 Skarbinski's testimony is to the effect that he thinks
20 he did file it (by dropping it in a drive-by mailbox
21 outside the post office) because that was always his
22 routine. We are not convinced, however, and therefore
23 have found that the 2008 return was not filed until
24 September 17, 2009, five months late. The addition to
25 tax therefore applies "unless it is shown that such

1 failure is due to reasonable cause and not due to
2 "willful neglect". The Skarbinskis do not claim
3 reasonable cause for late filing but rather insist
4 without success that they did file timely. We hold
5 that the Skarbinskis are liable for the addition to
6 tax under section 6651(a)(1) for 2008.

7 II. Negligence penalty

8 Section 6662 imposes a 20-percent penalty on
9 an underpayment of tax that results from negligence or
10 disregard of rules and regulations. See sec. 6662(a),
11 (b)(1). "Negligence" is defined as any failure to
12 make a reasonable attempt to comply with the
13 provisions of the Internal Revenue Code. Sec.
14 6662(c); 26 C.F.R. sec. 1.6662-3(b)(1). Negligence
15 has also been defined as the failure to exercise due
16 care or the failure to do what a reasonable person
17 would do under the circumstances. See Allen v.
18 Commissioner, 92 T.C. 1, 12 (1989), aff'd. 925 F.2d
19 348, 353 (9th Cir. 1991). Pursuant to section
20 7491(c), the Commissioner bears the burden of
21 producing sufficient evidence showing the imposition
22 of the penalty is appropriate in a given case. This
23 burden is met when the Commissioner shows--as the
24 Skarbinskis' return shows--that the taxpayer's
25 position was frivolous. See DiCarlo v. Commissioner,

1 T.C. Memo. 1992-280. Once the Commissioner meets this
2 burden, the taxpayer must come forward with persuasive
3 evidence that the Commissioner's determination is
4 incorrect. Rule 142(a). The Skarbinskis did not do
5 so.

6 A taxpayer otherwise liable for the
7 accuracy-related penalty may avoid the liability by
8 successfully invoking one of three other provisions:
9 Section 6662(d)(2)(B) provides that an understatement
10 may be reduced, first, where the taxpayer had
11 substantial authority for his treatment of any item
12 giving rise to the understatement, or, second, where
13 the relevant facts affecting the item's treatment are
14 adequately disclosed and the taxpayer had a reasonable
15 basis for his treatment of that item. Neither of
16 these defenses works for the Skarbinskis, however,
17 because the frivolous position on their return lacked
18 substantial authority or any reasonable basis. Third,
19 section 6664(c)(1) provides that a taxpayer may avoid
20 liability for the accuracy-related penalty to the
21 extent that he demonstrates that he had reasonable
22 cause for that portion of the underpayment and that he
23 acted in good faith with respect to that portion. 26
24 C.F.R. sec. 1.6664-4(b)(1). The Skarbinskis did not
25 have reasonable cause for their frivolous position.

1 III. Penalty under section 6673(a)

2 Section 6673(a)(1) authorizes the Tax Court
3 to impose a penalty not in excess of \$25,000 whenever
4 it appears that proceedings have been instituted or
5 maintained by the taxpayer primarily for delay or that
6 the taxpayer's position in such proceeding is
7 frivolous or groundless. A position maintained by the
8 taxpayer is "frivolous" where it is "contrary to
9 established law and unsupported by a reasoned,
10 colorable argument for change in the law." Coleman v.
11 Commissioner, 791 F.2d 68, 71 (7th Cir. 1986). The
12 statute grants the Court discretion in deciding
13 whether to impose the penalty.

14 The IRS proposes that we impose such a
15 penalty on the Skarbinskis. We will do so. Their
16 position in their petition was indeed frivolous, as
17 was their opposition to the IRS's motion for summary
18 judgment (filed February 29, 2012) after the warning
19 in our order of February 10, 2012.

20 However, tending in the Skarbinskis' favor
21 are these facts: (1) In addition to their frivolous
22 positions, they eventually had non-frivolous
23 contentions that resulted in a reduction of the
24 deficiency the IRS had determined. (2) They
25 eventually cooperated in litigating their non-

1 frivolous contentions. (3) They were forthright about
2 their frivolous positions, rather than attempting to
3 hide their receipt of income. (4) They conducted
4 themselves civilly before the Court. And (5) they now
5 undertake to comply with the tax laws in the future.

6 Nonetheless, after all the good that we can
7 say about the Skarbinskis, it remains true that they
8 took frivolous positions that prevented the IRS from
9 assessing tax that they certainly owed, and that
10 burdened both the IRS and this Court with all the
11 chores necessary for the adjudication of an inevitable
12 tax liability. The penalty of section 6673(a) is
13 designed to address petitioners who conduct themselves
14 in this manner.

15 In determining the amount of the penalty, we
16 take account of all the foregoing facts. We impose
17 today a \$1,000 penalty, which is a relatively modest
18 penalty, given that we have the discretion to impose a
19 penalty as high as \$25,000. The Skarbinskis should be
20 aware, however, that if they should ever repeat their
21 maintenance of frivolous tax litigation, they would
22 stand in peril of a much steeper penalty.

23 Decision will be entered under Rule 155, so
24 that the parties can recompute the Skarbinskis' tax
25 liability and liability for the addition to tax and

1 the negligence penalty. In addition, a penalty under
2 section 6673(a) will be imposed upon the Skarbinskis
3 in the amount of \$1,000.

4 This concludes the Court's oral Findings of
5 Fact and Opinion in this case.

6 (Whereupon, at 12:39 p.m., the bench opinion
7 in the above-entitled matter was concluded.)

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